

**IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai**

**Before Shri N.V. Vasudevan, Judicial Member
and Shri B. Ramakotaiah, Accountant Member**

ITA No. 3719/Mum/2009
(Assessment Year: 2005-06)

Shri Ramesh Babu Rao
35, BIT Buildings, Laxminarayan
Lane, Matunga, Mumbai 400019
PAN - AAAPR 9789 H

Appellant

A C I T - 17

Vs. Mumbai

Respondent

ITA Nos. 4084, 5318 & 5319/Mum/2009
(Assessment Years: 2005-06, 2007-08 & 2006-07)

D C I T - 17(3)
Room No. 614, 6th Floor
Piramal Chambers, Parel
Mumbai 400012
PAN - AAAPR 9789 H

Appellant

Shri Ramesh Babu Rao
Vs. 35, BIT Buildings, Laxminarayan
Lane, Matunga, Mumbai 400019

Respondent

Assessee by: Shri Ramesh Babu Rao
Revenue by: Shri Jitendra Yadav

ORDER

Per B. Ramakotaiah, A.M.

These are appeals by the Revenue for assessment years 2005-06, 2006-07 & 2007-08 and cross appeal by the assessee for A.Y. 2005-06. In assessee's appeal assessee is contesting the issue of reopening under section 147 as he got relief on merits whereas the Revenue is questioning the issue on merits.

2. Assessee is an individual and for A.Y. 2005-06 has declared an income of ₹2,70,98,632/-, for A.Y. 2006-07 an amount of ₹91,34,255/- and for A.Y. 2007-08 an amount of ₹69,53,635/-. These returns were originally accepted under section 143(1) and subsequently the case was selected for scrutiny in A.Y. 2006-07, AY 2007-08 whereas for A.Y. 2005-06 proceedings under section 147 were initiated on the reason that the assessee was showing

gains from purchase and sales of shares as business income till A.Y. 2004-05 whereas in the year under consideration, the same was shown as capital gains. In respective assessment years, assessee was asked why the short term capital gains claimed should not be treated as business income in view of the fact that in the earlier years assessee himself has shown it as business income and the volume of shares transacted had gone up in these years.

2. Assessee submitted that he is an investor from the beginning having retired from his lecturer job earlier and devoting himself for propagating religious activities as a member of ISCON. It was his submission that in the earlier years when assessee was offering the incomes under short term capital gains, the A.O. treated the same as business income and allowed certain deductions which were not claimed and, therefore, since the head under which it was taxed was not making any difference to the ultimate total income Assessee had not objected to the treatment and accepted eventhough no loss on valuation of shares on closing stock was claimed in any year nor a trading account was prepared. It was assessee's submission that in financial year 2004-05 relevant for A.Y. 2005-06 the assessee sold away all the existing shares as on 01.04.2004 in the month of May 04 itself and subsequently decided to invest only in the stock market and his action was ratified by subsequent introduction of Securities Transaction Tax as well as treatment of short term capital gains at 10% and long term capital gains at nil for tax rate purposes. Therefore assessee has become an investor. It was further his submission that assessee has not indulged in any speculative activity and not traded in F&O segment and all the shares purchased were taken delivery, paid securities transaction tax and all the transactions are through a recognised Stock Exchange. Assessee submitted that there is no deliberate attempt to deprive the Revenue of any tax on account of concessional rate because all his share holding as on 01-04-2004 was sold off by May itself and only few transactions were there which were also sold off on 30.09.2004 by which time the tax on short term capital gains was reduced to 10%. It was his submission that the incomes earned upto 30.09.2004 was offered @ 30% as short term capital gains and it does

not make any difference whether the income upto that date was treated as business income or short term capital gains. With reference to the subsequent purchases it was his submission that he was an investor and was dealing only as an investor and there is nothing wrong in claiming benefit provided by the Union budget 2004-05. With reference to the tax structure and short term capital gains it was his submission that assessee has not pledged any shares with any financial institutions, nor borrowed any funds, taken delivery of all shares in demat account and he is an informed investor but not a trader. The A.O., however, did not accept and relying of the Board's circular analysing the volume and nature of transactions came to the conclusion that the assessee is not an investor but a trader and this conclusion was also considered keeping the fact that assessee till AY 2004-05 was offering the income as business income and therefore in respective assessment years the incomes offered under capital gains were treated as business income and certain expenditures were allowed thereby taxing incomes under the head 'Business income'.

3. Before the CIT(A) assessee contested the reopening of the assessment under section 147 for A.Y. 2005-06 and treatment of the income in all the assessment years. The CIT(A), after examining the transactions and principles, has come to the conclusion in favour of the assessee and allowed the income from delivery based transactions as long term capital gains. The CIT(A)'s finding in para 7 are as under: -

"7. I have carefully considered the information on record. The appellant is dealing in shares for the last several years. Till A.Y. 2001-02, income from share transactions were offered to tax under the head capital gain. From A.Y. 2002-03 onwards, his income from share transactions were assessed under the head business income. During the appellate proceedings, the books of account of the assessee were perused. The appellant is recording the purchases and sales scrip-wise. The result of purchase and sale value is always recorded as short term capital gain. The stock in trade of shares available as on 31.03.2004 and the purchases made upto September, 2004 were completely sold by September, 2004. In the books of account the result of purchase and sale made during the entire year was recorded by the appellant as short term capital gain. In summary, the three types of transactions, the appellant had were;

- (a) Stock in trade available as on 01.04.2004 and sold by 30.09.2004.
- (b) Purchases made during April to September, 2004 sold by September, 2004.
- (c) Purchases and sales made from October, 2004 onwards.

In the books of account the result of all three types of transactions was recorded as short term capital gain. However, in the return of income the result of first two types of transactions were offered as business income and the third transaction was offered as short term capital gain. It is pertinent to mention here that, as per CBDT Circular No. 4 of 2007 dated 16.06.2007 it was stated that the investor can have two portfolios, one for the purpose for investment and the other for the purpose of trading. Further, as per the decision of the Hon'ble ITAT, Mumbai in the case of Bombay Gymkhana Ltd. 115 TTJ 639 (Mum), 2008 wherein it was held that the A.O. cannot take a different view contrary to the books of account merely on the basis of magnitude and number of transactions, without bringing any evidence. It was also held that the entries in the books are not conclusive but there should be firm basis to take the view different from the books of account. It is also pertinent to mention here that the actual capital employed by the appellant was approximately Rs.4 crores and the sales made were to the tune of Rs.24 crores. Hence the ratio between turnover and capital cannot be considered as high as regular trader would have done much more turnover with the capital of Rs.4 crores. It is also important to note that accounting year 2004-05 pertains to book period in share market as and when the desired appreciation in the value of shares was achieved the investor would sell the share resulting in frequent shuffling. Keeping in view that the appellant is an individual, does not have any infrastructure, transactions are delivery based and transactions are recorded as investments in books of account, the appellant should be treated as investor and not as trader. Further in case of Gopal Purohit Vs. CIT (2009) 29 SOT 117 (MUMBAI), the Hon'ble Tribunal held the income from share transactions as capital gains. The facts of the case were the person carrying out activities was broker, transactions were more than 100 crores with full fledged office. In that case the income from day trading was held as business income and income delivery based transactions were treated as Short Term/Long Term Capital Gain depending on period of holding.

In view of the above discussion, the A.O. is directed not to treat the capital gains as business income."

4. The learned D.R. reiterated the contentions raised by the A.O. whereas the assessee himself appeared and made submissions. The paper book in this regard filed before the CIT(A) were also placed on record. The submissions made before the CIT(A) in which various issues were discussed

elaborately including the legal orders were also placed before us and similar arguments were extended by the assessee and countered by the learned D.R. Both the parties have relied on various case laws, mostly of ITAT orders given in various cases.

5. We have considered the issue. It is true that CBDT has established certain parameters to analyse the transactions in Stock Exchange undertaken as a trader or as an investor. The A.O. has analysed these transactions to come to the conclusion that these transactions are in the nature of trading and not as an investor. After hearing assessee's arguments, we are of the view that the assessee is only an investor and has not undertaken the investment in the stock market as a business venture. He is an informed individual being an economist earlier teaching the subject in a college and after leaving that job he has taken to religious preaching and investing in stock market for gains with his knowledge. One could see that he is a good timer of purchase and sale of shares whereby substantially increasing his gains in the stock market. One of the reasons taken by the A.O. was about large turnover. The reason for large turnover is because of bulk purchases and sales in a scrip. There are very few transactions of purchase and sale, as the assessee is purchasing in block of a particular share in large volume. As analysed in A.Y. 2005-06 by the A.O. there are 54 scrips which are purchased and sold during the year which resulted in sales of more than ₹24 crores. The A.O. analysed one particular share of Dhampur Sugar and concluded that there were purchases on 54 occasions and sale on 25 occasions. As seen from the details assessee has entered into market in this particular scrip on 03.12.2004, went on buying upto 1,00,000 shares upto 24.12.2004. Then on 28.12.2004 he sold 40,000 shares and on 29.12.2004 he sold 60,000 shares. Later on he again purchased another one lakh shares on 30.12.2004 which was disposed off on 06/07 January 2005. As indicated there are only sale on three instances and purchase on four instances. In our considered view, this reason can be a deciding factor to hold as a trader. Considering the fact that assessee is not a broker or sub-broker and also not having any office establishment and also on the fact that all the shares as available on 01.04.2005 were sold

mostly by the end of May and few shares at the end of September, assessee has intended to be an investor subsequent to the change in the scheme of tax by the Finance Act 2005. On these facts, we see no reason to interfere with the findings of the CIT(A) in holding that the assessee's transactions are to be treated as capital gains, short term or long term depending on the period of holding.

6. We have to place on record that the parties before us have relied on various case law given in different set of facts. There are some orders holding that the transactions are business in nature (ITA No. 2586/Mum/2009 Smt. Sadhana Nabera vs. ACIT) and at the same time other orders treating the transactions as that of investment only. We analysed all that orders and are of the opinion that each case has to be decided on its own facts without establishing any parameters as it is difficult to determine whether a particular transaction is in the nature of business or as in investment. In this particular case on these facts, we are of the opinion that assessee is an informed investor and therefore, the gains earned by the assessee in the purchase and sale of shares in the stock market are to be treated as short term capital gains/long term capital gains, as the case may be, as the assessee is not doing any speculative activity nor indulging in any sales without delivery, the parameter which may tilt a particular case to hold it as trading. In view of this, we support the order of the CIT(A) and dismiss Revenue's appeals in the impugned assessment years.

7. As far as assessee's appeal is concerned, assessee is challenging the reopening under section 147. Earlier there was only a processing under section 143(1) and no assessment under section 143(3) was done. The reopening was done within 4 years. The A.O. has recorded a reason that assessee was offering the incomes as a trader in earlier years under the head Business whereas in this year offered as short term capital gains. Therefore, we are of the opinion that there is a reason to believe that income escaped assessment at the time of initiation of proceedings under section 147. In view of this the order of the CIT(A) on this issue is upheld and

assessee's ground on reopening of the issue under section 147 is therefore dismissed.

8. In the result, all the appeals are dismissed.

Order pronounced in the open court on 13th April 2011.

Sd/-
(N.V. Vasudevan)
Judicial Member

Sd/-
(B. Ramakotaiah)
Accountant Member

Mumbai, Dated: 13th April 2011

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) – XXVIII, Mumbai*
4. *The CIT– XVI, Mumbai City*
5. *The DR, “D“ Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.